

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
ONE THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947

March 2, 2005

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RE: Eby v. Thompson  
C.A. No. 03C-10-010(THG)

Date Submitted: February 8, 2005

Dear Counsel:

Following the release of my decision of February 3, 2005, the Plaintiffs filed a timely Motion for Reargument which was granted and heard on February 22, 2005.

The Court remains satisfied that summary judgment should be granted as my opinion remains unchanged that no factual basis exists to permit the Plaintiff to seek punitive damages from the railroad. To hopefully clarify my ruling, I withdraw my February 2, 2005 decision and issue this decision in its place. As to Norfolk Southern Corporation's Motion for Summary

Judgment as to the punitive damages claim by Plaintiffs, Jeanette and Deborah Eby, Cynthia Adamire and the Estate of William L. Eby, the motion is GRANTED.

According to Superior Court Civil Rule 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>1</sup> The Court must view the record in a light most favorable to the non-moving party, and if it finds that there are no material issues of fact therein, it may grant a motion for summary judgment.<sup>2</sup> The burden is first on the moving party to show that there are no material issues of fact. The burden then shifts to the non-moving party to demonstrate what material issues of fact remain.<sup>3</sup>

On June 29, 2003, in Seaford, Delaware, a collision occurred between a motor vehicle driven by the decedent, William Eby, and a trailer carrying a stump grinder which broke loose from a vehicle driven by defendant Steven J. Thompson. The trailer separated from Mr. Thompson's vehicle just after the truck passed over a set of railroad tracks owned and operated by Norfolk Southern Corporation. The crossing traverses Route 20 just west of the City of Seaford. Mr. Eby was killed in the accident and his wife, Jeanette, was injured. The Plaintiffs, Jeanette Eby, Deborah Eby, Cynthia Adamire and the Estate of William Eby instituted a personal injury and wrongful death suit against several parties. The Defendants include Steven

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<sup>1</sup>Sup. Ct. Civ. Rule 56 (c).

<sup>2</sup>See *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>3</sup>See *id.*

Thompson, Al Gove, Al's Affordable Tree Care, Rental Equipment Center, Inc., Croft Trailer Supply, Inc., and Norfolk Southern Corporation.

Norfolk Southern Corporation (hereinafter "Norfolk") filed this Motion for Summary Judgment in response to Plaintiff's claim for punitive damages. The Plaintiffs allege, *inter alia*, that the motor vehicle accident was caused by Norfolk's failure to properly maintain and repair potholes in the railroad ties and tracks at the crossing. The police report filed after the accident described the pothole as:

damage in the bed of the railroad track on the south edge of the roadway, north of the white fog line, between the rails of the track. The damage was almost square in shape. The damage measured 1'2" by 1'2" at its largest points. The narrowest width measured 7 and a half inches in length. It measured two and three quarter inches in depth. I watched traffic crossing the tracks on separate occasions, but never observed any eastbound traffic come close to the damaged portion of the railroad track. Vehicles observed ranged from commercial tractor-trailers to compact cars. The center of the damage was located 1'6" north of the south edge of the roadway and 24'6" east of the Reference Point. There was no evidence located at the scene to indicate this occurred as a result of the collision and appears to have been pre-existing damage.

The above portion of the police report is cited for the purpose of indicating the size of the pothole located at the crossing. Whether or not Mr. Thompson's vehicle struck the pothole and whether or not the pothole contributed to the accident are questions of fact which are viewed in a light most favorable to the Plaintiffs. Based on this damage and Norfolk's preexisting knowledge of it, Plaintiffs included a claim for punitive damages based on Norfolk's alleged failure to maintain a safe crossing. In addressing the issue of whether a punitive damages claim may be presented to

the jury, one must look to the underlying facts of a case to see if there “was evidence of egregious conduct of an intentional or reckless nature.”<sup>4</sup>

At oral argument, I noted that, in my opinion, if the railroad employees observed the pothole and made a decision that it was not in need of immediate repair, but ultimately this decision was found to be faulty, then their conduct might constitute negligence. If they knew the pothole was a danger to traffic and chose to do nothing, then their conduct might rise to recklessness and punitive damages may be appropriate for a jury to consider.

I asked Plaintiffs’ counsel to cite the facts in this case which constitute egregious conduct on the part of the railroad to justify putting punitive damages before the jury. As I understand the Plaintiffs’ position, the facts on which punitive damages should be considered are as follows:

1. that the railroad had a protocol for the inspection of railroad crossings which required regular (monthly) inspections and the reporting of anything amiss to a supervisor;
2. both Mr. Beavers and his supervisor observed the pothole and made no effort to have it repaired;
3. the railroad does not have any standards in place as to pothole repair leaving the decision as to whether or when a pothole should be repaired to the discretion of the maintenance personnel;
4. Plaintiff’s expert will testify that the industry standard is that crossings should be maintained in the same condition as the original construction which would mean all potholes must be repaired regardless of size. This would essentially create a “zero-tolerance” standard for potholes; and
5. that Beavers and his supervisor were unaware of such industry standards and used their own judgment when it came to pothole repairs.

Discovery yielded considerable information about Norfolk’s oversight and maintenance of the crossing at issue. Roger Beavers, a Norfolk employee, was responsible for a monthly

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<sup>4</sup>See *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987).

inspection of the crossing. Prior to the accident, Mr. Beavers noticed the pothole at this particular crossing on two monthly visits and reported the problem to his supervisor, Steven Carpenter. Based on Mr. Beavers' report, Mr. Carpenter also visited the crossing and inspected the pothole before the accident occurred. Both men assessed the nature of the damage and determined that immediate repair was unnecessary. Mr. Carpenter and Mr. Beavers agreed to keep a watchful eye on the area to ensure that the damage did not develop into a safety risk.

The Plaintiffs obtained an expert, Alan J. Blackwell, a railroad consultant, who they contend will testify that Norfolk failed to follow its own safety standards and industry safety standards by allowing the damage at the crossing to go untreated. After reviewing the Plaintiff's allegations, including the proffers made on February 22, 2005, I find that the punitive damages claim must fail.

Punitive damages are intended to act as a deterrent to defendants rather than compensation to a Plaintiff. They are a special class of damages, reserved for defendants who exhibit an "I don't care attitude" or a wanton or willful disregard for the rights of others.<sup>5</sup> "The penal aspect of public policy considerations which justify the imposition of punitive damages require the Court to impose these damages only after a close examination of whether the defendant's conduct is outrageous because of evil motive or reckless indifference to the rights of others."<sup>6</sup> But "[i]nadvertence, mistakes or errors of judgment which constitute mere negligence will not suffice."<sup>7</sup>

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<sup>5</sup>*Cloroben Chemical Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983).

<sup>6</sup>*Greenlee v. Imperial Homes Corp.*, 1994 Del. Super. LEXIS 386, at \*23-26.

<sup>7</sup>*Id.*

In *Furek v. University of Delaware*, a former university student and fraternity pledge sued the University for not curtailing hazing activities which it was aware were frequently practiced in the Greek system.<sup>8</sup> The student suffered serious physical injuries when a hazing incident went amiss.<sup>9</sup> The Superior Court denied the University's pretrial motion for summary judgment on punitive damages.<sup>10</sup> The facts that developed during the trial, however, led to the Court's dismissal of the punitive damages claim. The Court found that

the University's conduct might be faulted in terms of its failure to exercise greater control over a known hazardous activity...[but] [w]hile the University is chargeable with notice of hazing activities on its campus in the years preceding Furek's injuries, its response, which a jury could deem ineffectual, was, nonetheless, well-intentioned and not characterized by a conscious disregard of a known risk.<sup>11</sup>

The record is void of any evidence that Norfolk exhibited a wanton or willful disregard for the Plaintiffs' or public safety, or an "I don't care attitude" as to the potential danger posed by the pothole. There is nothing to support a conscious disregard of a known risk by Norfolk. The railroad performed monthly inspections of the area and investigated any potential areas of concern. Norfolk company policy requires that "[i]f the person making the inspection detects unsafe conditions or deviations exceeding allowable limits, he is to initiate corrective action."

Upon inspection of the pothole, Norfolk's representatives found that "it was not unsafe. It was something [they] needed to monitor. And if [they] saw the condition worsen, [they] would then determine a plan to correct it." The determination was a subjective judgment call as to the

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<sup>8</sup>*Furek v. University of Delaware*, 594 A.2d 506, 511 (Del. 1991)

<sup>9</sup>*Id.* at 509-10.

<sup>10</sup>*Id.* at 511-12.

<sup>11</sup>*Id.* at 523.

safety of vehicular traffic over the crossing. Both Mr. Beavers and Mr. Carpenter determined that the area was one of interest, but not of concern. Nothing in the record indicates that this determination was an egregious or willful neglect of public safety. The Plaintiffs failed to demonstrate Norfolk's wanton disregard for public safety.

The employees charged with inspecting and maintaining the safety of the crossing used their subjective judgment in assessing the danger posed by the damage to the tracks. The Plaintiffs allege that the railroad should have complied with objective industry standards. Even assuming the railroad employees mistakenly applied the wrong standard, which may indicate negligence, there are no facts which point to recklessness on their part for this mistake or error. Nothing has been shown to indicate that the railroad's conduct was egregious or a willful and conscious disregard for the safety of others.

Nor has there been a showing that the standard applied by the railroad was egregious per se and that the railroad had knowledge of these standards, but willfully and consciously chose a lesser standard. I do not find that the Plaintiffs have shown that the decision to leave the pothole unrepaired was an act of reckless disregard for public safety. Nor do I find that the precise harm which eventually occurred was reasonably apparent but consciously ignored in the formulation of the decision or judgment.

After reviewing several railroad crossing cases involving negligence and punitive damages claims, I was unable to locate any cases that allowed punitive damages with similar facts. Most cases involved egregious conduct such as the failure of a railroad to place signals at a

crossing over a period of years despite being told of the need to do so,<sup>12</sup> a failure to cut back growth around crossings to ensure motorist safety despite warnings of dangerous overgrowth<sup>13</sup> or a failure to repair after being warned of a dangerous condition.<sup>14</sup>

In *Jardel*, a leading Delaware case on punitive damages, the Supreme Court considered whether the defendant in that matter anticipated the precise harm which eventuated, but consciously disregarded an obligation to avoid it. The Court noted that a defendant could not be held liable for failing to recognize and consciously ignoring the potential for a kidnapping and rape to occur when it was previously put on notice of general criminal conduct. The *Jardel* court held that it may have been an error of judgment or negligent for the defendant to not employ a larger security team, “but it can hardly be said that Jardel turned its back on a known risk.”

Likewise, in this case, there is nothing to establish that the railroad employees consciously ignored the precise harm that occurred in this case. There is no indication that they anticipated a trailer becoming disengaged from the vehicle pulling it, propelling backwards and fatally injuring someone.

Finally, I note that, to the extent the Plaintiffs inferentially argue that the employees made an economic or cost-saving decision to delay maintenance, *Jardel* holds that “[a]n economic decision may be the basis for punitive damages, however, only if the economic cost is

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<sup>12</sup>*Luna v. Southern Pacific Transp. Co.*, 724 S.W.2d 383, 385 (Tex. 1987); *Stromquist v. Burlington Northern, Inc.*, 444 N.E.2d 111, 1117 (Ill. App. Ct. 1983).

<sup>13</sup>*Harvey v. Norfolk & W. R. Co.*, 390 N.E.2d 1384, 1389-90 (Ill. App. Ct. 1979).

<sup>14</sup>*Hazelwood v. Illinois C. G. Railroad*, 450 N.E.2d 1199, 1206 (Ill. App. Ct. 1983).

intentionally weighed against a perceived risk which includes the reasonable likelihood of the harm which occurred.”<sup>15</sup>

There is no doubt that a tragedy has occurred with grievous impact upon Mr. Eby’s wife and children. However, punitive damages should not be considered simply because of a tragic outcome. Punitive damages, being penal in nature, are reserved for conduct which is outrageous, caused by an evil motive, or recklessly indifferent to the rights of others. The railroad employees may have made the wrong decision, but the decision was void of any egregious intention or conscious disregard for public safety. “Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice. . . . It is not enough that a decision be wrong. It must result from a conscious indifference to the decision’s foreseeable effect.”<sup>16</sup> In this case, a “conscious indifference” has not been established by the Plaintiffs.

For the above reasons, the Motion for Summary Judgment on the issue of punitive damages as to Norfolk is GRANTED.

Very truly yours,

T. Henley Graves

THG/jfg  
oc: Prothonotary

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<sup>15</sup>*Jardel*, 523 A.2d at 531.

<sup>16</sup>*Id.* at 529.